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Crits and Cricket: A Deconstructive Spin (Or Was It a Googly?)

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*"Do you know who made you?" "Nobody,
as I knows on," said the child, with a
short laugh ... "I 'spect I grow'd."*

Harriet Beecher Stowe, *Uncle Tom's Cabin*

Something of a precocious "child," critical legal studies (CLS) is already in its teenage years. In its short, but hectic life, it has already made a significant contribution to modern legal thought and practice. Measured quantitatively, its presence is strong and incontestable: there are around 800 articles and books that can loosely be grouped under the rubric of CLS. Its qualitative impact is more controversial: its intellectual reception runs from enthusiastic acceptance to vehement rejection. Indeed, the intensity and heat generated by CLS writers, both collectively and individually, testify to its growing significance in jurisprudential debate and practice. Many have chastised CLS for its irreverence and a few have gone so far as to demand its ejection from the law schools.¹ Yet most would agree that CLS is the most challenging and exciting genre of legal criticism to force its way onto the jurisprudential scene for many a decade.

Now facing the awkward rites of adolescent passage — a certain crisis of identity, a keener appreciation of race and gender differences, and a relative loss of social innocence — the time is ripe to take stock of CLS's development and its relevance to Canadian jurisprudence.² It must be said that CLS is an American phenomenon. Its very shape and life history can be fully comprehended only in terms of the history and practice of the concrete circumstances of the American legal, academic, and political establishments. The most pertinent factors include the lack of any sizeable left tradition in popular politics; the isolation and victimization of left intellectuals in the universities; the male monopoly on legal and political power; the legacy of institutional racism; the thoroughly professional orientation of legal education; and the centrality of the Supreme Court in the constitutional scheme and national psyche. Nevertheless, its methodological insights, suitably muted, are pertinent to the Canadian context. The objective of this essay is to explain the nature and aspirations of CLS's central ideas and ambitions. After a brief glimpse at the origins of CLS and its general orientation, I will explicate the substance and aspirations of the "law is politics" claim. In order to substantiate this discussion, I will offer a typically deconstructive-style CLS reading of a case and end by emphasizing the democratic possibilities of such an approach.

I

Over the past decade, CLS has mounted a major offensive on the whole edifice of modern jurisprudence. The fight is over the meaning and enforcement of "the entrenched clauses of the constitution of the republic of [legal] knowledge."³ Put crudely, the central thrust of CLS's attack has been to continue and go beyond the realist project by allying it to a program of left politics. Many CLS conclusions are far from novel or surprising, but they do comprise the most sustained and serious attempt by left lawyers to expose the political dimensions of the adjudicative and legal process. Not simply an intellectual tendency, it exists as a membership organization. Many of the founding CLS members were students during the civil rights movement and the anti-Vietnam campaign of the 1960s. As such, CLS recognizes these activist roots as the energy source of much of its theoretical endeavour — there is nothing so practical as a good theory. Practical commitment and group solidarity remain crucial values in the CLS ethos. In the early 1970s, the closest place to a haven for legal radicals was the Law and Society Association. But there was already disenchantment with its "empirico-behaviourist" alignment.⁴ After some discussion, CLS was officially born in the spring of 1977 at a conference at the University of Wisconsin at Madison. Its membership includes law teachers, lawyers, social theorists, and law students. As well as being an intellectual focus and clearinghouse for left writers, it represents a collaborative network to support and reinforce the professional activities of like-minded people.

There are many different strands to CLS and its members run from the disaffected liberal, through the radical feminist, to the utopian anarchist. Much of its organizational strength and intellectual integrity reside in this diversity and eclecticism. But they unify in their common opposition to the intellectual and political dominance of the liberal establishment. Although liberalism once contributed to the improvement of the social lot, it has now outlived its usefulness and has become a dangerous political anachronism. Offended by the hierarchical structures of domination that characterize modern society, CLS people work toward a just world that is more democratic and egalitarian. They do not wish to embroider further the patchwork quilt of liberal politics, but strive to cast it aside and reveal the vested interests that thrive under its snug cover. Their ambition is to make a bigger social bed with more popular bedding. Not surprisingly, CLS's particular contribution to this social struggle has concentrated on the leading part that law has played in maintaining the status quo and stymieing efforts at fundamental change.

A common question is whether CLS is realism rewarmed or realism rejected.⁵ It is both and neither. As CLS views it, in the 1920s and 1930s, realism toppled the regnant formalism not as a prelude to overthrowing liberalism, but as a way of making good on the liberal promise. Realism's attacks were never intended to be more than a palace revolution.⁶ The realists were ideologically and practically wedded to the reform program of New Deal liberalism. They effected a pragmatic shift of institutional focus rather than a thoroughgoing rejection of liberal politics: they wanted to replace judge-dominated legal science with bureaucracy-wielded policy science. Indeed, the fact that most lawyers today can claim, with considerable credibility, that "we are all realists now"⁷ says much about the traditional view of realism. In contrast, CLS has redoubled the realist assault on formalism and extended it to political as well as legal claims of scientific rationality. Like the neo-formalists, such as Hart and Sacks, that followed them, the realists smothered the truly radical insights and

implications of its critique. CLS has salvaged these powerful insights and insisted that no objectively correct results exist, regardless of whether they are presented in terms of legal doctrine or policy analysis and no matter how skilled the advocate or judge is. For CLS, the taking of political sides is inescapable.

Although CLS offers a thoroughgoing and ideological critique of law and liberalism, it has not stepped back into the welcoming arms of orthodox Marxism. CLS has no truck with the belief that there is a direct causal and substantive nexus between material conditions and the legal superstructure. It denies the possibility of discovering intelligible and settled laws of historical/social/economic/etc., change. While recognizing that law often does act as a weapon and shield for the "capitalistic" organization of society, CLS argues that law functions as much as a legitimating force as a deterministic instrument. Law and society are not separate spheres, but are mutually constitutive and they interpenetrate. In this sense, CLS builds on the more critical part of the Marxist canon.⁸ Like liberalism, Marxism glimpsed the corrosive power of social relativity and historical contingency, but suffered a final lack of nerve in completing the modern rebellion against the view that there is any natural or inevitable form of social organization. CLS has refused to shrink back from the subversive implications of this imperative.

For CLS, critique must begin and proceed with the operation of law as ideology. This is not to trivialize the coercive functioning of much law, but to supplement and strengthen the radical critique. For CLS, the rule of law is a mask that lends to existing social structures the appearance of legitimacy and inevitability; it transforms the contingency of social history into a fixed set of structural arrangements and ideological commitments. CLS's demonstration that the status quo and its intellectual footings, far from being built on the hard rock of historical necessity, are actually sited on the shifting sands of social contingency, is both critical and constructive. Not only does it expose the illusory and fraudulent claims of traditional writers, but it also clears the ground for different and transformative ways of thinking about law and society. In a world in which law plays such an important role, the need to understand the historicity and ideology of the lawyer's way of thinking about, and acting in, the world is so important. From abstract theory to thick descriptions of legal doctrine, CLS writers have explored the intimate relation between law and the routine practices of social life.⁹

In mounting its uncompromising offensive on law and legal theory, CLS has operated on two major and mutually supportive fronts. Although they function in harness, they can be treated separately for the purposes of explication as operating "internally" and "externally." The internal critique takes seriously conventional writing, both scholarly and judicial. CLS engages jurists and judges on their own turf and shows how they fail to live up to their vaunted standards of rationality and coherence: they cannot withstand the debilitating force of their own critical apparatus. The main target of CLS has been the crucial distinction between law and politics; or, to be more precise, the alleged contrast between the open ideological nature of political debate and the bounded objectivity of legal reasoning. CLS rejects this axiomatic premise of traditional lawyering. Beneath the patina of legalistic jargon, law and judicial decision making are neither separate nor separable from disputes about the kind of world we want to live in. Legal reasoning consists of an endless and contradictory process of making, refining, reworking, collapsing, and rejecting doctrinal categories and distinctions. Doctrinal patterns can never be objectively justified and consist of a haphazard cluster of ad hoc and

fragile compromises. Legal doctrine is a small and unrepresentative sample of conflictual problems and their contingent solution.

The esoteric and convoluted nature of legal doctrine is an accommodating screen to obscure its indeterminacy and the inescapable element of judicial choice. In the cold light of CLS day, traditional lawyering is reduced to a clumsy and repetitive series of bootstrap arguments and legal discourse becomes merely a stylized version of political discourse. Yet, and most important, this revelation of indeterminacy is not tantamount to a dismissal of legal doctrine as incoherent or unintelligible. Its purpose is to clarify rather than to cloud our understanding of doctrinal operations. Nor is it tantamount to a suggestion that doctrinal development is autonomous from the status quo-oriented prejudices of ideological debate, for there exists doctrinal indeterminacy with an ideological slant. The judicial emperor, clothed and coiffured in appropriately legitimate and voguish garb by the scholarly rag trade, chooses and acts to protect and preserve the propertied interest of vested white, male, and monied power.

The CLS claims of indeterminacy and contradiction do not simply go to legal doctrine and theorizing, they go to the very heart of liberal democratic politics. Doctrinal indeterminacy is a localized illustration of the bankruptcy of liberal theory and practice. The ailing corpus of black-letter legal theory cannot be made good by injecting a dose of black-letter political theory. Liberalism embraces a host of dualities, such as objective/subjective, male/female, public/private, self/other, individual/community, or whatever, as devices for providing a plausible description of the world and a convenient prescription for action. As in the legal sphere, political debate is open-ended and unclosable. It exhausts itself in an agonized struggle for the very elusive Archimedean point outside history and society from which to mediate the dualities and sustain a position of normative equilibrium. Liberalism is pervaded by contradictory principles with no metatheory to reconcile them. Political decisions and social arrangements can never be objectively justified and amount to contingent choices. But, while they are arbitrary in a theoretical sense, these decisions are not arbitrary in a practical sense, because they follow the general pattern of established interests.

Although most CLS work is seen to work along the "internal" front, it draws much of its theoretical purpose from the simultaneous campaign being waged on the "external" front. While the internal critique is powerful and productive, its success is necessarily limited. A demonstration of rational incoherence and internal contradiction is only fatal within a liberal tradition of rationalist epistemology.¹⁰ This concession far from trivializes the internal critique, because the established and irrepressible presence of incoherence and contradiction delegitimizes and demystifies the authority of law in constructing and maintaining social reality. To be fully convincing and successful, the whole liberal tradition of rationalist epistemology must be discredited and dismantled. This is exactly what the "external" critique of CLS takes aim at. CLS does not simply contest the practical policies yielded by traditional legal theorizing, it rejects the very basis of contemporary legal theorizing. As in the celebrated dispute between Galileo and the Italian establishment, it is not merely the truth of nature that is at stake, but the nature of truth itself. CLS seeks to reformulate the ground rules by revising the epistemological and political criteria for valid legal theory. Drawing on the work of radical philosophers and social theorists, CLS is attempting to provide a fresh touchstone for distinguishing good knowledge from bad. Although traditional scholars pride

themselves on being engaged in "a continuing dialogue with reality,"¹¹ CLS rejects the structure of that dialogue and the substance of that reality.

Despite its pluralist protestations, mainstream lawyering and legal thought remains in thrall to an ideal of legal/political rationality. CLS writers have ruthlessly attacked this "foundational" thinking. There is no privileged ground for legal/political argument to stand or build on. Doctrinal understanding is more a matter of professional familiarity and political partiality than moral insight and technical correctness. Legal/political rationality is no less constructed than the courts of law themselves. For CLS, there is no position of theoretical innocence or political neutrality. Any act of interpretation or judgment has indissociable political and historical dimensions. The question of what amounts to valid knowledge is itself a socio-political matter. Legal epistemology is ideological warfare fought by other, more esoteric means.

II

Despite common understandings about the political character of law, there remains a core belief that law retains an essential degree of autonomy. Legal interpretation can, and should, be performed in a way that distinguishes it from the more open-ended, ideological debates that are the stuff of political struggle. Borne and practised in politics, the idea is that law somehow manages to retain a distinct accent and idiom that speaks to politics, but is not entirely spoken for by that politics. As law is not optional and can be coercively imposed, the independence and impartiality of lawyers and judges is paramount. "[Their] authority and immunity depend upon the assumption that [they] speak with the mouth of others."¹² Legal reasoning is something more than simply what lawyers happen to say. If it was only that, it would warrant no greater (nor lesser) respect and deference than what ideologues, steelworkers, and accountants say or sing.

To provide a convincing justification of the crucial distinction between law and lawyers, it must be shown that the doctrinal materials that comprise the law cannot offer determinate guidance in the resolution of most legal cases. In a political and legal system that claims to be democratic, such impersonal constraints on the important activities of unelected officials is vital to that system's continued legitimacy and appeal. This need is particularly acute in the area of constitutional adjudication. In other words, I will argue that legal interpretation is thoroughly political because its performance and product can never be detached from the identities and interests of the interpreters. In short, the prestige and authority of lawyers is unfounded in political practice and unfindable in political theory.

Doctrinal analysis remains the primary work of the law student, professor, practitioner, and judge. The task of the lawyer is portrayed as similar to that of the warehouseperson. Law comprises a great storehouse of rules, principles, and similar normative goods that have been individually catalogued and systematically shelved. During the course of business, goods shift in and out of the warehouse in response to the quantity and quality of legal trade. Apart from keeping the detailed inventory, doctrinal analysts have to ensure that incoming norms are screened and sorted so that the existing stock is not contaminated by unsuitable or errant goods. At any time, however, experienced scholars can point to a principle or set of rules that is appropriate to revolve a particular litigate dispute. Also, they will be able to perform a

thorough stock-taking and present a workable account of the totality of normative goods housed. An exhaustive survey is precluded by the open-ended character of such goods, and the brisk nature of legal trade. Doctrinal analysts do not consider the elucidation of an underlying prescriptive theme or grander normative unity to be part of their job description. They feel that they have ample work cut out for themselves in conquering the technical details in their own chosen alcove of the doctrinal warehouse. Doctrinal analysts accept that economics or philosophy might be valuable to a broader understanding of their warehousing craft, they simply do not think that it is their responsibility to pursue such inquiries.

Under this traditional division of jurisprudential labour, such a pursuit falls squarely within the duties of legal theorists — that is, to provide the larger and more integrative view of law, to evaluate its performance, and to fathom its relation to other disciplines. This contemporary project has taken many diverse shapes and sizes. Some have turned to the humanities for inspiration and found recent writings (of Rawls, Nozick, Hayek, or ...) in political and moral philosophy to be precisely what the jurisprudential doctor ordered. Others have preferred the social sciences and find intellectual succour in the models of the economists or sociologists. Still others have resorted to the study of language itself and taken comfort in its hermeneutic possibilities. Yet, in raiding these other disciplines, legal theorists have maintained an often neglected, but shared informing ambition. They have sought to supplement the doctrinal analysts' understanding of the law by revealing the inherent rationality or normative underpinnings of the law.¹³

This replacement of black-letter law with black-letter theory should not come as a surprise. Contemporary legal theory is a more sophisticated continuation of the traditional search for Coke's "artificial reason and judgment of law."¹⁴ Straining the truly radical insights and implications of the realist critique through a traditional sieve, contemporary scholars have served up a thin gruel of neo-formalism. Interdisciplinary study is not necessarily more liberating nor less narrowing. The shift from *ratio decidendi* to Pareto optimality or Kantian normativity is of dubious merit. The role of interdisciplinary study is not to supplant legal reasoning nor to provide a substitute for legal wisdom, but to locate and understand them better. In delving into the foreign fields of other scholarly disciplines, the hope remains constant. There is no desire to open up the legal project to the subversive messages of some of those toiling in the anthropological or sociological soil of radical study. The objective of this extra-legal adventure is to complete the traditional program of legal theory, not to undermine its validity or success.

The force of this commitment to understanding law and its study as autonomous is revealed in the literature on adjudication. The primary and self-imposed task of legal theorists is to explain and suggest how judges can make the law responsive to changing social demands and, at the same time, retain democratic legitimacy. In other words, how can judges engage in politics in a distinctly "legal" way? The realization that, without an organizing and informing political vision, legal reasoning is reduced to a desultory game of catch-as-catch-can and is part of the received conventional wisdom. Legal theorists recognize that the larger questions of political justice must be addressed by any serious account of legal development and that adjudication is quintessentially political in performance and product.

Without a workable and convincing separation of law and politics, therefore, the legitimacy and prestige of courts and legal doctrine is undermined. However, in defending this crucial distinction, it is important to understand what claims are and are not being made;

the nature of the distinction and its modern articulation are of a very particular kind.¹⁵ All lawyers concede that legal activity, whether it pertains to legislation, litigation or law enforcement, arises in broadly political circumstances and that it will have some political consequences. Notwithstanding this, the law- and politics-problematic assume that there can exist a way of thinking about law and politics as independent and separable entities that is both possible and desirable. It must not only satisfy the constraints of immanent or transcendent rationality, but must meet the demands of political justice. While I do not think that such an achievement is attainable, it suffices to say that that immaculate position has not been attained to date. The idea that the many different judges in many different places might all be operating unknowingly under the influence of one "invisible hand" or "mind," stretches the bounds of credulity to breaking point. The idea that this unifying mentality is not only just, but happens to be the same as the theorists making this discovery, is surely too much even for the most faithful among the academic establishment. Consequently, although our existence in the law school and the legal community at large may demand a focus on matters legal, it does not follow that law and lawyering must be treated as a distinct way of thinking and acting. Because legal theorists deal with what lawyers do, it does not mean that they have to elevate it to a privileged category of human activity with a special epistemological and ontological status. Although federal parliamentarians are not provincial representatives, it does not follow from this fact that their basic identity as politicians is different in any normative or critical sense.

At a general level, law and politics interact and interpenetrate in manifold and mutually generative ways. Law is not only a political artifact of the first-order, it is also a primary artisan of its political context. Legal interpretation is a thoroughly political phenomenon and activity. The life of the law is more than logic and less than our total experience. Of course, it does not mean that, because law and politics are fully implicated in one another, they replicate each other in a simple or undistorted fashion. There is no form of social life "out there" independent of the law that constitutes and structures it. Nor is there any law "out there" independent of the society that generates and defines itself through that law.¹⁶

It is extremely difficult, if not impossible, to describe a state of affairs without drawing on the lexical imagery of legal relations. As a white man, father, husband, worker, property owner, etc., my life is saturated with and organized around different legal ideas. While law works to impoverish the richness of my life by reducing it only to legal relations, it does play a significant role in formulating my own self-image and patterns of behaviour. The act of representing the world to which law applies is already thoroughly informed and constituted by the forms and structure of legal thinking. Law does not function as an independent variable in a complex social equation, but amounts to some of the very fibers and sinews of social life. It is not possible to think or act as a lawyer without taking a political stand or having a vision, no matter how unconscious or crude, of the collective and individual possibilities for human development.

The whole practical operation of the law is illustrative of how lawyers (and laypeople) treat the law's conceptual apparatus and discursive categories as natural and how, in the process, they confer the status of the real and concrete on the abstract and metaphorical. For instance, when deciding whether a contract exists between two parties, lawyers speak and act as if they were looking for a "contractual" thing in a drawer full of social events and circumstances. It is assumed that, if all the facts were known, "the contract" would somehow

body forth and bring the dispute to a demonstrable close. Yet, as all law students know, a contract is an idea, not a thing; it is an abstract construction in a socio-historical context. It exists in the realm of metaphysics, not in the world of physicality; a written contract is not *the* contract, but simply evidence of the contract.

Similarly, property does not comprise the tangible objects in the physical world, but the abstract relation between such visible effects and people.¹⁷ Although born of historical expediency and sustained by political convenience, legal categories, like contract and property, take on a life of their own and begin to paralyze the lawyers' imagination. Unlike the life of the so-called natural world, social activity responds to these conceptual metaphors and reproduces itself in accordance with them. The life of law and lawyers is not unaffected by prevailing ideas about what life should or ought to be. Not only does this give the law a patina of plausibility and coherence, it allows lawyers to refer to "reality" as confirmation of the naturalness and inevitability of prevailing legal structures and their underlying values. The fact that this process occurs unconsciously makes it no less political and much more effective. Definitions of law and its component parts are not referential facts, but political claims and ideological appropriations.¹⁸

III

Under the rubric "law is politics," the critics take a very different view of the epistemological status and methodological validity of law's claim to determinacy. Legal doctrine does not conform to any simple internal rationality nor is it reducible to a cluster of external organizing principles. While there is clearly an inseparable and organic relation between law and politics, there is no one account of that relation that is valid for all time and all societies. Indeed, any explanation is itself indeterminate because its character and implications vary with the context.¹⁹ While they offer opinion and evaluation, they do not make claims about whether doctrinal materials *necessarily* and *universally* determine results nor whether those results are *necessarily* and *universally* good or bad. Critics are decidedly against any kind of functionalist or instrumentalist account of the relation between law and politics, whether it comes from the right, left, or centre of the political spectrum. Law is "neither a ruling-class game plan nor a repository of noble if perverted principles ... [but] a plastic medium of discourse that subtly conditions how we experience social life."²⁰

With imagination and industry, legal materials can be organized to support and justify incompatible outcomes. The fact that the general drift of these outcomes corresponds to the orientation of status quo thinking and values is not necessary; it is not a matter of doctrinal rationality, but a question of political orientation. The socio-economic context is itself largely indeterminate and requires no particular rule for its continued survival, while a shift in the whole regime of legal rules (for example, the postal acceptance rule and the finders' rules) will not be crucial. Moreover, in the same way that the socio-economic context underdetermines law, that very same law overdetermines the possible outcomes to any legal dispute. There is a general and pervasive indeterminacy that plagues all attempts, not simply jurisprudential ones, to explain social events and to fix social knowledge.

Even where there appears to be a consensus on the existence of any particular rule, nothing necessarily flows from that concession. Whether a rule exists, and what it means, are different enquiries. While they are not entirely unrelated, the issues give rise to a different set of conceptual and normative concerns. For example, a person's ability to identify the French language is of little help in determining what any particular example of it means. Rules do not operate as impersonal and dispositive forces in social conflicts. Their existence and meaning are more often the consequences, rather than the causes, of a particular resolution. Furthermore, even if there is a consensus on the meaning and existence of a particular rule, there is always another rule that competes for application; or, the dispute can be reclassified to another doctrinal field, for instance, from tort to property or contract.²¹ Indeterminacy infiltrates all levels and dimensions of the law; it energizes and debilitates the interpretive process and search for meaning.

The effort to identify one definitive and normative explanation of that regime is defeated by the fact that a theory will not be able to achieve the appropriate mix of analytical generality and historical particularity. It will run the risk of overinclusion or underinclusion. A theory that merely describes the extant details of legal practice will not be able to predict the direction and nature of doctrinal change. It will cease to be useful at the very time its assistance is most required — the identification and resolution of hard cases. On the other hand, a theory that attempts to move beyond such detailed description will run into two major obstacles. It will be unable to account for a sufficient range of present legal data and lose its descriptive power. Alternatively, it will be compatible with various combinations of legal materials that comprise existing legal doctrine and fail to deliver on its predictive promise.

Contrary to the traditional view, the law is a locus of conflict. There are a host of different interpretations competing for descriptive and predictive superiority, but none is able to claim final victory. Insofar as uncontested interpretation is only possible where there is a preexisting and shared set of values, the competing and contradictory forces at work in forging legal doctrine foreclose the establishment of the necessary consensus. Accordingly, legal doctrine is not a reflected embodiment of one indwelling and sufficient theory, but is the formal site for the attempted, but unattainable blending and reconciliation of competing theories. The temporary accommodations made are more a result of political expediency than moral purity. Although one theory may tend to dominate and infuse the law with its guiding principles, a competing theory will constantly challenge it and provide a debilitating set of counter principles. At times, the tension will precipitate doctrinal crisis, while at other times, the friction will be subdued and relatively untroubling. Yet, muted or manifest, it fuels and informs doctrinal development. The particular trajectory charted and followed will, at least in part, be a function of the larger historical forces that impinge on the legal and judicial enterprise.²² Consequently, in this general sense, law is another arena for the stylized struggle over the terms and conditions of social life. In sum, law is politics.

As the critical position has gained intellectual ground, a number of misunderstandings have drifted (or been pushed) into popular circulation. The most persistent and pervasive of these hold that critics contend that law does not matter, that all cases can be decided either way, that judges act out of purely subjective preference, and that lawyers consciously manipulate doctrine. Although these misapprehensions are attributable to a whole range of prestigious sources, they are nicely brought together in a short article by Alvin Rubin.²³ By

confronting them, the claim that "law is politics" can be clarified further and the charge that the law is indeterminate can be strengthened.

A common opinion is that the critics are devoted to the view that "doctrine is nothing."²⁴ It is supposed that they maintain that legal doctrine is so fundamentally indeterminate that it possesses any meaning at all and has no magnetic pull on the resolution of particular disputes. Each case is imagined to be scribbled on a clean slate and can be decided in a variety of incompatible ways. This version of the non-autonomist position is a *reductio ad absurdum*. It exaggerates the consequences of a rigorous skepticism, ignores the historical point of the critical inquiry, and takes the political edge off the critique. It is definitely not the non-autonomists' case that there can be no general consensus on the shape and substance of past doctrine nor that the resolution of particular cases cannot be confidently predicted. To ignore such facts is to counsel a dangerous other-worldliness. But it is the case that law fails to meet its own proclaimed standards of rational justification and cognitive clarity. Law is indeterminate, but it is not arbitrary nor entirely unpredictable. Unsupplemented by external influences and values, legal doctrine can never, of itself, determine the "correct" and "unique" answer to a particular dispute. Any fragile consensus about meaning or any confidence in prediction does not arise from within doctrine, but is given to doctrine from without.

Legal doctrine is not simply "out there," but is always in need of collective retrieval and re-creation. The past is unknowable in and of itself. The past has passed and was what it was, but it is up to those who follow to decide what it will become: the future of the past is a present and continuing responsibility. Tangled in a skein of fact and fancy, history can never be excavated in its pristine immediacy, but can only be experienced secondhand. Consequently, meaning is always provisional, in that it is always open to (re)interpretation, and conditional, in that it is only knowable from an interpretive perspective. Legal reality is the historical function of the ideological commitments that comprise a legal community at any given time, a community whose identity and expression is itself an interpretive artifact that is never "self-present as a positive fact."²⁵ There does not exist a necessary and adequate connection between legal outcomes and doctrinal materials.

None of this is intended to deny the shared sense of doctrinal intelligibility that everyone experiences at some time. Indeed, in the theoretical interrogation of "shared meaning," there is an implicit and unavoidable reliance on the practice of shared meaning.²⁶ What it is intended to do is to show that there can be no law without interpretation, no interpretation without judges, and no judges without politics. The crux of the matter is not the existence of institutional meaning and general predictability, but the source and authority of the normative reading offered or supposed. On what basis can one reading be privileged over another? Legal doctrine need not be as it is; it always contains the resources for its own reinterpretation and revision. Doctrinal consistency and regularity are not attributable to law, but to the politics of lawyers. While every case could be decided doctrinally in contradictory ways, the relatively homogeneous values of lawyers and judges ensure that some results will be much more likely than others. Law's reconstructive potential can never be squeezed out by its present actuality; closure of doctrinal openness is only bought at the price of intellectual self-delusion and philosophical puzzlement. Accordingly, the critical truth is that doctrine is not nothing, but a special kind of something. It means nothing until it is interpreted and, although it will always have meaning, its meaning will be determined by those who interpret it.

② A second misunderstanding, which flows from the first, is that, if there is any validity to the critics' claims, it only has any force in cases "which are unusual, indeed exceptional."²⁷ This argument relies on the familiar distinction between easy and hard cases. Whereas the vast majority of cases will be straightforward and capable of disposition through the uncontroversial application of precedent, a small minority of cases will raise novel or contested issues and require a more creative approach that goes beyond precedent. There remains disagreement within the traditional ranks as to what extent judges in hard cases are constrained by doctrine in its larger sense.²⁸

The easy/hard case distinction is more of a deferral of the autonomy issue than a definitive resolution of it. The difficulty centres on the method by which such a distinction is to be made and that method's origin and normative status. In order to maintain intellectual credibility, the distinction must be defensible in terms of its necessary and internal legal pedigree and not as the creature of contingent and external political considerations. To do otherwise would be to recognize that law is driven by politics and, as such, to deny the autonomy of law from politics. And this is exactly what reliance on the easy/hard case distinction does. Moreover, this manoeuvre points up a more general infirmity in the attempt to defend a law-politics separation. If law is valued because it is separable from politics, it can only be because it is politically desirable to effect such a separation. The autonomy of law cannot be intrinsically valuable, but must be justified by reference to nonlegal values. In short, the upshot is that the law-politics distinction is thoroughly political in character and ambition.²⁹

When analysis is pushed beyond the simple invocation of the easy/hard case distinction, its political nature is plain. Within the doctrinal and juristic materials, a hard case is one in which the application of precedent leads to a conclusion that is unacceptable because, for example, it is out of step with conventional views of justice. This means that the easy case is one in which the conclusion is acceptable. It follows, therefore, that easy cases are not decided by purely doctrinal prompting, but merely couched in doctrinal language: it is prevailing ideas of "acceptability" that decide the case. Consequently, while it is true that most cases are easy, it is not because existing rules dispose of them, but because their disposition by the rules is considered to be acceptable.³⁰ In effect, all cases are hard in the sense that they demand, no matter how unreflective or taken for granted, an initial appeal to extra-doctrinal considerations of acceptability. Easy cases are one kind of hard case, and any defence of adjudicatory autonomy premised on their independence is destined to fail.

③ The third common misunderstanding is that critics hold that "decision-making is pure result-selection followed by rationalization."³¹ This view posits the suggestion that judges are consciously manipulative ideologues who combine in a Machiavellian manner with their colleagues to implement a clear and self-serving scheme of social (in)justice. To associate critics with such a crude view of human decision making and motivation is to ignore their sophisticated articulation of the operation of legal ideology. The ascription of such judgmental self-consciousness to individual actors is a feature of the very political philosophy that the critics are most at pains to discredit and dislodge. The whole critical enterprise is devoted to abandoning the dichotomous view that law is either the reflection of a pure reason or the exercise of pure power. Instead, it contends that reason and power are inseparable: each informs and provides the context for the other.

To be plausible, any critical theory of adjudication must be able to account for the judges' felt boundedness. It cannot discard the actual experience that decision makers have of being compelled by doctrine to reach particular results. Nevertheless, this existential fact does not require a denial of ideology. Its most important function is to offer a framework for formulating a personal identity and self-understanding, including the idea that we are independent operatives in the social world. Legal consciousness operates so effectively precisely because it persuades the "rulers" as well as the "ruled" that the judicial function is a constrained and impersonal exercise of official authority. It is as flawed to propose that the lawyer is everything as much as it is to suggest that the law is everything. Although there are instances of overt manipulation, legal doctrine amounts to more than the residual traces of the judicial mind's unbounded free-play. The posited distinction between "that to be interpreted" (doctrine) and "that which interprets" cannot be sustained.³² Neither doctrine nor lawyer exclusively controls meaning. Each is implicated by and in the other. Both doctrine and lawyer are shaped by their political milieu; they interact and interpenetrate to generate legal discourse and its reality. Judgment and values are neither the objective essences of an intelligible world nor the subjective fantasies of a chaotic existence. They are the contingent effect of varied and overlapping *economies* of intellectual, social, and political thought.

IV

The proof of any theoretical pudding is in the eating. This is as true for the critics' position as it is for that of the traditionalists. The major argument that must be defended is that law is different from politics in that the application of legal reasoning to particular problems will make an appreciable difference to their resolution. If these cases had been left to the ebb and flow of ideological exchanges, the autonomists' argument must be that the outcome would be different. Of course, it is not necessary for it to be shown that the result will be different in every case, only that there would be a difference in a statistically significant number of cases. Also, the autonomists must be able to demonstrate that this difference is attributable to a reliance upon legal reasoning and not traceable to the political preference of the legal reasoner. In short, the law *per se* must make a difference.

For the traditional claim to pull any epistemological weight, its proponents must show that law is a rational discipline and not merely a convenient battery of technical rationalizations. Doctrinal justification must be more than conventional apparel for naked political preference. Furthermore, the demonstration that any particular decision is wrong or errant will not be enough in itself to support their arguments. Those who believe in law's determinacy must presumably accept a difference between being a bad judge and not being a judge at all. Rather than concentrate on the identifying criteria of legitimate legal reasoning, it can be more instructive to put the usual questions in a slightly different way — what might *not* amount to a legal analysis of the facts and the doctrinal matters in a particular dispute? And what might *not* count as a judicial resolution of them?

In order to substantiate these criticisms and to join substantive issue with traditional scholars, I will discuss the case of *Miller v. Jackson*.³³ It deals with the vexed issue of "coming

to the nuisance" — that is, whether it is a defence to an otherwise successful action in nuisance that the offending state of affairs existed prior to or at the time of the plaintiff's acquisition of land. Although it is generally agreed that this is not a defence, there still thrives a vibrant debate about its precise scope and application and meaning.³⁴ After summarizing the facts and decision, I will critique one particular traditional account of the rule — Posner's — and offer my own "critical" reading of the judgments. The aim is not to show that there is no rule, nor that there is no better or worse result in specific circumstances, but to establish that the doctrine does not of itself preclude or require any particular outcome and that no one result is uniquely preferable to any other.

The Millers lived on a housing estate that was recently built by a cricket ground where cricket had been played for about 70 years. As a result of their complaints, the club erected a high fence to prevent balls invading their garden. This proved to be no real deterrent and according to the Millers, the situation became so intolerable that they felt obliged to vacate their home whenever a game was played. Finally, they applied to the court for an injunction to restrain the playing of cricket. The club conceded that, while cricket was played, there was no foolproof way of stopping cricket balls going into the Millers' garden. However, the club denied that its activities amount to an unreasonable interference with the Millers' enjoyment of their property. Moreover, it insisted that it had taken all reasonable measures to protect the Millers.

Although the Millers were successful at first instance, the Court of Appeal upheld their claim for damages, but refused to grant an injunction against the playing of cricket. In reaching this decision, the reasoning of the judges is all over the doctrinal map. Lord Denning M.R. concluded that there was no negligence and no nuisance. As the club had offered to pay \$800 for past and future damages, he ordered the payment to the Millers of that amount. At the other extreme, Geoffrey Lane L.J. held that there was both negligence and nuisance and that an injunction should be granted. As a consoling gesture to the club, he postponed its issuance for 12 months in order to allow for the location of a new ground. Finally, Cumming-Bruce L.J. occupied a middle position and determined that there was both negligence and nuisance. However, he refused to grant an injunction and awarded damages of \$800. Accordingly, while the Millers won their action and recovered \$800 in damages, cricket was still played and balls continued to pepper their garden.

The fact that the judges' reasoning and conclusions are so evidently at odds with one another confirms little. But it does offer a rich set of textual materials with which to work. While some might want to criticize a particular judgment as unsound or impolitic, it is difficult to suggest that any of the three judgments does not amount to legal reasoning or cannot be justified in terms of the existing doctrinal materials. Legitimacy or validity is not the issue; rather, it is one of wisdom and cogency. Yet, when each judgment can claim to be a plausible performance of the judicial craft, it renders somewhat transparent the assertion that law is a constrained mode of decision making. Of course, it could be contended that, if one of the judges explicitly and exclusively decided the case on the basis that the playing of cricket should be promoted ahead of all other activity, he or she would not be acting judicially. Instead, they would be deciding in line with their own personal values and preferences. However, at best, this merely shows that a decision that is not couched in the language of the law does not deserve the label "legal." This is not a particularly devastating charge or interesting revelation.³⁵ For it to be so, it would have to be demonstrated that the decision was

not motivated by "nonlegal" considerations and then framed in the conventional rhetoric of legal argumentation. It is surely the case that the demagogue does not become a democrat because she dresses like one. Rationalization is not reasoning.

The critic would clearly be wrong to argue that it is not the generally stated rule that "coming to the nuisance is no defence to nuisance." But this does not dispense with the indeterminacy claim, it simply offers a site at which to locate and begin the deconstructive excavation. Indeed, Posner's discussion of the rule and his implicit acceptance of its uncontroversiality establish the ground for such an opportunity. While it is easy to state the existence of the rule, it is much more difficult to explain its meaning and scope. Posner's own illustrations of the problems with applying the rule in different fact situations undermine rather than reinforce his autonomist commitments. He provides clear confirmation of the critics' major claims: that there is a large gap between general rule and particular result; that the gap can only be filled with extra-legal considerations; and that these considerations will be the determinative factor in any decision. All in all, his arguments give modern emphasis to the traditional sentiment that the law of nuisance "is immersed in undefined uncertainty."³⁶

Posner approves of the "no defence" rule not because it is simply the law, but because it is defensible as a matter of sound economic policy. When interpreted as placing liability on the party who could have avoided competing resource uses at the least cost, it enhances the maximization of wealth by ensuring that patterns of resource use are not "frozen" and that the possibility of changing use is reflected in the investment decisions of land developers.³⁷ Nevertheless, Posner cautions that "rejecting coming to the nuisance is the efficient rule provided costs are calculated on the correct ex ante basis."³⁸ For example, where a long-established polluting factory is gradually engulfed by encroaching suburban developments, the relevant balancing is not between the relative moving costs of the factory and the suburbanites, but is between the moving costs of the factory and the cost at which the suburbanites could have initially located elsewhere.

Of course, the outcome of this balancing will depend upon the particular costs in each case. In the example Posner uses, because the factory's costs are less than those of the suburbanites, the result is that there is no nuisance and the factory can continue its operation (and polluting). This seems that, in those particular circumstances, coming to the nuisance is a very real and effective defence. This is a flat contradiction of Posner's support for the common law's rejection of the defence. Posner compounds this dissemblance in this discussion of the familiar *Spur Industries* case, in which the court held the defendant's activities to be a nuisance, but ordered the plaintiff to pay the defendant's moving costs.³⁹ He supports this "ingenious" decision on the basis that it "creates an incentive for the party coming second ... to go elsewhere instead if its costs of locating elsewhere, prior to its locating next to the nuisance, would be lower than the cost to the defendant of moving."⁴⁰ This is an express negation of the common law rule and a demonstration of its indeterminacy, not an account of its determinate explication and application.

Nevertheless, although Posner manages to reject the general rule in the course of his professed support for it, it could be contended that the economic rule of "least-cost avoider" is sufficiently determinate to deflect such criticisms. This response fails for at least two reasons. First, the deeper and more ideological difficulty is that any calculation of allocative efficiency is always dependent upon contestable and, therefore, indeterminate assumptions about the prior distribution of resources. The value of any particular resource is inextricably

linked to whether or not a person already possesses it and what other resources they might already possess.⁴¹ Second, the "least-cost avoider" rule is open to exactly the same objections as the "no defence" rule. The major stumbling block is the notorious difficulty of isolating and quantifying the relevant costs with the necessary degree of confidence and precision. Not only will much depend on the level of transaction costs, but the respective costs of the parties are so detailed and so interdependent that their calculation is always speculative and hypothetical — Who are the relevant parties? Is it the plaintiff, the suburbanites at large, or the developer? What amounts to a cost? Who or what decides cost in a particular case? When is valuation to occur? In short, general theoretical plausibility is confounded by specific factual malleability. As Judge Posner has remarked, "the exactness which economic analysis rigorously pursued appears to offer is, at least in the litigation setting, somewhat delusive."⁴²

All these observations on Posner's analysis can be brought together in considering his likely response to the *Miller* case. By his lights, anything is possible and all bets are on. The looseness of his "least-cost avoider" interpretation guarantees that any outcome can be justified and supported — the continuance of cricket; the continuance of cricket with payment of damages; the prohibition of cricket; and the prohibition of cricket with compensation for relocation. The crunch question is what costs are to be included in the social calculus. It is surely the case that the economic variables can be selected and quantified to ensure very different computations of the economically optimal result. Indeed, more to the point, there is no technical or objective way in which to assign or formulate such costs. Some values will be overlooked, while others will receive disproportionate attention.⁴³ Is it the costs of the Millers that are to be tabulated? Or is it the initial relocation costs of the developer of the residential estate that should be assessed? What about those neighbours who view the proximity of the cricket club as a benefit? Is the valuation to be based on general market prices? Or is it the Millers' idiosyncratic costing that should prevail? Do the club's costs include the inconvenience to the players, spectators, and their opponents? How is such disappointment to be quantified? Is tradition or local culture to count at all?

Once the "appropriate" costing and calculation has been made, the decision would presumably be written up by Posner in his favoured style of judicial reasoning. Moreover, whatever outcome is arrived at, the decision will simply be a card to be played in the continuing game of bargaining and behaviour modification. The law will not be the arbiter of the dispute, but will only be a factor in the workings of the market. In theory, for instance, the club could "buy out" any injunction awarded to the Millers or the Millers could "bribe" the club to continue their cricket elsewhere. This raises another thorny problem of valuation, namely, wealth effects. Is the relevant figure the amount the Millers would be willing to pay to the club to stop the cricket or is it the amount the Millers would be willing to accept from the club to permit the cricket? In answering these riddles, the so-called traditional virtues of doctrinal predictability, determinacy, and integrity are ransomed to the cause of a spurious and crude political instrumentalism. The law becomes the agent of the market rather than its principal and legal theory becomes the tool of the marketeer.

V

This critique of Posner can be generalized and tied to a broader theory of legal interpretation. I shall call this "deconstruction."⁴⁴ Although it has come to be used as a general catch-all for any unconventional criticism of law and legal theory, it is a very subversive and profound form of philosophical critique. Its target is the whole edifice of western metaphysics. In jurisprudential terms, the ambition is to show that law and legal doctrine are not and cannot be informed by an overarching rationality. It is not that legal doctrine is irrational, nonrational, or meaningless, nor that it is any more or less rational than any other mode of thought or reasoning. On the contrary, deconstruction shows that law is of a piece with other forms of social knowledge. There is no rationality, but there are many rationalities and all are as historically conditioned, politically specific, and socially constructed as each other.

Deconstruction is not a philosophy, but a theoretical strategy for displacing traditional philosophy, especially its insistence upon the existence of a stable foundation for truth and knowledge. However, for the deconstructionist, referentiality and meaning are not so much nonexistent as profoundly problematic. The attempt to demonstrate and defend any theory of embodied meaning is ruthlessly revealed as leading into a black hole of historical deferment. No interpretation is right or wrong and no mode of linguistic signification can achieve interpretive hegemony. It is not that deconstruction erases meaning or denies intentionality, but that it perpetually postpones and decentres them and thus deprives them of any privileged or original authority. It foils any orderly attempt to progress to knowledge or recover meaning by denying that there can ever be philosophical closure to the vertiginous attempts at historical appropriation. Nonetheless, deconstruction is not randomly or wantonly destructive. It takes the object of its critique and, working to collapse it from within, deconstructs the constructs of philosophy to better reveal their constructedness.

To understand and control the world, traditional thinking employs a set of enabling distinctions that are treated as natural and obvious, such as objective/subjective, reason/emotion, or mind/body. This means that any coherent and cogent account of fixed meaning and grounded knowledge must not only explain the precise and stable relation between these oppositions, but also find a way of talking about them that is itself precise and stable. It claims to do this by privileging one over the other and granting epistemological authority to it. In contrast, deconstruction goes behind these hierarchical dichotomies and shows that they have a history and are far from natural or obvious. Operating from inside the traditional paradigm, deconstruction unravels and lays bare the contradictory, inescapable, and warring forces that both constitute and confound the common sense meaning of words and texts. A good example of this is the historically constructed and contexted distinction of male/female, which is used to justify a whole set of conceptual and social practices.

Moreover, these duplicitous dualities of consciousness cannot be sustained. The unprivileged "other" disrupts and undermines its privileged partner. While it is a necessary contrast to it, it is also a contradiction of it. So interrelated are they that the one not only makes the other possible, but contributes to its negation: "neither/nor, that is, *simultaneously* either or."⁴⁵ In short, what is excluded is implicated in and is essential to what is included: philosophy depends on the very history that it is at pains to deny. The metaphysical dream of providing a solid foundation for truth and knowledge is doomed to failure by its own lights. Importantly, however, the deconstructive technique is not intended simply to reverse the

hierarchical order and place — for instance, community over individual or woman over man in terms of epistemological authority. It is to be understood as rejecting entirely the dichotomous and passive mode of thinking about the world, in favour of a more engaged and active way of truth-making.

The three judgments in *Miller* offer a rich textual diet on which the hungry critic can feast.⁴⁶ In particular, Denning's judgment is an opportunity *par excellence* for the deconstructionists to show their analytical stuff. It is a textbook example of the flipability of supposedly opposite categorizations and the arbitrary prioritization of one term over the other. The deconstructive challenge is to describe the process by which this occurs and the interests that it serves. As such, critique is a simple laying bare of contradiction's insidious existence at the heart of doctrinal being. Denning's efforts to negotiate the public/private distinction set the stage perfectly for such a description:

[I]t is our task to balance the right of the cricket club to continue playing cricket ... as against the right of the householder not to be interfered with There is a contest here between the interest of the public at large and the interest of a private individual. The *public* interest lies in protecting the environment by preserving our playing fields in the face of mounting development, and by enabling our youth to enjoy all the benefits of outdoor games, such as cricket and football. The *private* interest lies in securing the privacy of his home and garden without intrusion or interference by anyone As between their conflicting interest, I am of the opinion that the public interest should prevail over the private interest. (981-82)⁴⁷

It takes little imagination to realize that Denning's pouring of social wine into the conceptual bottles of public and private interests can be of a very different kind. The playing of cricket can be as "private" a matter as sitting out in the sun and the security of people's homes can be as "public" a matter as the preservation of playing fields. Although the flipability of Denning's characterization is plain and simple in *Miller*, it is possible to make such a switch in all situations. In short, the raw materials of life do not present themselves to policymakers as always and already divided into natural categories of social interest. The world is not given, but is constantly being made and re-made. Seeds of fact reap a rich harvest of values only when cultivated by ideological gardeners. Denning's depiction of the contestants is a prescriptive act of creation rather than a descriptive report of detachment.

Having established the competing interests and assigned the litigants to their respective sides of the balancing scales, Denning proceeds to place his thumb on the side of public interest. In such contests, he seems to assume that it is axiomatic that "the public interest should prevail over the private interest" (982). The whole judgment is given over to establishing a rhetorical climate in which the prevalence of the public interest seems obvious and natural. Yet Denning offers no argument as to why this conclusion should be treated as self-evident. Indeed, he begs the very question that this analysis is supposedly directed toward answering — when and why does the public interest prevail over private interest? When it comes to the decisional crunch, the Master of the Rolls hides behind declaratory platitudes, like "[o]n taking the balance, I would ..." and "[a]s between their conflicting interest, I am of the opinion ..." (981 and 982), and elides any explanatory reasoning. His judgment draws its appeal and cogency, if any, from his efforts to tap the political sensibilities and sympathies of its intended audience than from the logical rigour of its doctrinal analysis.

The style and phrasing of Denning's offering is structured by the contradictory impulses of "progress" and "tradition." Although his judgment is voiced predominantly in the accent of a progressive preference for calculations of public interest in matters of competing land use, there is a more subtle idiom of traditional rhetoric that runs alongside and is often intertwined with the more dominant tone. At the same time that he refuses "to approach this case with the eyes of the judges of the 19th century" and insists that "it should be approached on principles applicable to modern conditions" (978 and 981), he is adamant that temporal priority is deserving of legal precedence. He frequently and pejoratively contrasts the cricket club's long-standing contribution to the community to the Millers' status as "newcomers" (976 and 981). In this consummate exercise in judicial craft, Denning manages to couch a defence of vested property rights in the language of social progress. For all his rhetorical support for progress and public interest, the driving force of the decision is the conservative desire to preserve the status quo: "I would agree [with Lord Reid's dictum that 'if cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all'] if the houses or road was there first and the cricket ground came there second" (977).⁴⁸ Of course, to reach the same result, Denning could have run a more straightforward traditional defence of vested interests, but this would have robbed the decision of much of its success as a rhetorical exemplar.

Cumming-Bruce and Geoffrey Lane take a different tack to Denning, but still manage to ground themselves on the shoals of contradiction. The particular dilemma that they perceive, and from which they seek to escape, is that between precedent and equity or, in grander terms, between positive law and natural law. It is a manifestation of the tension between the desire for stability and certainty and the simultaneous urge for flexibility and maneuverability. At the heart of this dilemma is the acceptance that justice demands, as an institutional matter, both the general embrace of rule-driven adjudication and the occasional departure from it; "the rules transcend the case as immediately experienced, the insight is immanent in it."⁴⁹ The challenge for judges is to decide in which particular circumstances the general rules are to be observed or overlooked. The traditional response by which to contain and mediate this contradiction has been the regular, but unconvincing resort to "discretion."

For both Cumming-Bruce and Geoffrey Lane, their personal sympathies lay with the cricket club, whose officials they found to be "candid and forthright" (984), rather than with Mrs. Miller, whom they thought verged on the "neurotic" and "obsessive" (983 and 989). However, they both also agreed that existing doctrine seemed to mandate a result in the Millers' favour. This presented them with the classic contest between the pull of precedent and the lure of justice. For Geoffrey Lane's part, he opts to follow the rules laid down. But, in doing this, he does not act against justice, but in the name of justice. He collapses the distinction between law and equity by assuming that justice requires strict obedience to the results of rule application:

Precedent apart, justice would seem to demand that the plaintiffs should be left to make the most of the site they have elected to occupy with all its obvious advantages and equally obvious disadvantages If the matter were *res integra*, I confess I should be inclined to find for the defendants Unfortunately, however, the question is not open It may be that [the rule in *Sturges v. Bridgman*] works injustice, it may be that one would decide the matter differently in the absence of authority. But we are bound by [that] decision ... and it is not for this court as I see it to alter a rule which has stood for so long. (986-87)

Whereas Geoffrey Lane arbitrarily conflates law and equity, Cumming-Bruce arbitrarily separates them. He seeks to demonstrate that discretion can be used to temper the rule without swallowing the rule. It is a matter of equity being ordered by the law and discretion being required by the rules. While justice requires that rules are followed, the rules sanction the resort to discretion. It is an implicit attempt to instruct Geoffrey Lane in the possibilities of legal doctrine and judicial craft. Agreeing with Geoffrey Lane on "his reasoning and conclusion upon the liability of the defendants" (987), Cumming-Bruce relies upon the distinction between liability and remedy to escape the dilemma of contradiction:

There is authority that, in considering whether to exercise a judicial discretion to grant an injunction, the court is under a duty to consider the interests of the public ... So on the facts of this case a court of equity must seek to strike a fair balance between the right of the plaintiffs to have quiet enjoyment of their house ... and the opportunity of the inhabitants of the village ... to enjoy ... a summer recreation ... It is relevant circumstance which a court of equity should take into account that the plaintiffs decided to buy a house which ... was obviously on the boundary of a quite small cricket ground ... There are here special circumstances which should inhibit a court of equity from granting the injunction claimed. (988-89)

This deconstructive reading of *Miller* hopefully shows that legal doctrine is another combat zone over the terms and arrangements of social life. With varying degrees of sophistication, the three judges engage in a rhetorical exercise that is intended to persuade people (and themselves) that law possesses an autonomy from the open-ended encounters of overt ideological confrontation. In contrast, the responsibility of the critic is to counteract these attempts to depoliticize and dehistoricize the judicial development of doctrine. By reinstalling politics and history into the legal enterprise, people might come to see that the determination of legal meaning involves an inevitable taking of sides. Law is neither separate nor separable from disputes about the kind of world there is and can be. Law is the historical residue of one kind of political struggle.

VI

Nietzsche's apocalyptic announcement that "God is dead" echoed a truth that had been long grasped by most lawyers. The belief that law represented God's design never held much sway. It was conceded that law was a human artifact. It could never amount to much more (and was often much less) than a flawed distillation of divine wisdom. However, despite this traditional acknowledgment and modern protestations to the contrary, the enclaves of law remain "caves, for ages yet, in which His shadow will be shown."⁵⁰ Instead of dwelling on God's loss, jurists must rest content with "voicing the dictates of a vague divinity";⁵¹ these pseudo-theological musings usually come veiled in the trappings of philosophy and economics. While lawyerliness might no longer be next to godliness, dreams of hubris still fire the jurisprudential imagination. Abstract reflection is given priority over experiential engagement. Detached reason remains the touchstone for valid knowledge about ourselves, our situation, and the legal order. In the struggle for social justice, philosophy and science are preferred to democracy. As law is cast as an exercise in reason, lawyers are fated to become

philosophers or social scientists if law is to perfect itself and operate as a guide for the anguished democrat.

Yet, with a recognition that reason and power are connected, this self-image of the lawyer or legal theorist as a trader in eternal verities must be abandoned. As the high priests of traditional theorizing, Posner and his ilk must be defrocked. Indeed, the whole theoretical endeavour will have to undergo a radical reappraisal and reorientation. Philosophy (of law) must cease to be a task of refined description and defined prescription; it must become a political project of deconstruction and reconstruction. The whole agenda of questions to be answered — What is law? How is it different from politics? — is in need of redrafting. Loaded questions engender loaded answers. Those particular questions assume that law is indeed different and the jurist's primary task is to explain how it is different. Archibald MacLeish had the measure of contemporary scholarship: "we have learned the answers, all the answers; it is the question that we do not know."⁵² The answers that Posner and the autonomists propose cannot be rejected out of hand. But they can be stripped of their false objectivity and treated as one more series of proposals to be debated and considered in the popular assembly of democratic politics. As such, an explanation of the law's indeterminacy does not hasten the demise of democracy, as many traditional writers seem to predict. This is merely a scare tactic designed to underwrite and warrant their own tenuous power. The indeterminacy critique is fatal to the legitimacy of the adjudicative enterprise, but it is not damaging to democracy. While indeterminacy jeopardizes any mode of objective decision making, it does offer an understanding of how ordinary citizens can and must be entrusted with increased responsibility and authority in the name of democratic empowerment.

To traffic in philosophical disillusionment is not to indulge in a cheerless cynicism. It is neither nihilistic nor irresponsible. By encouraging people to understand themselves as the makers of decisions and not as the amanuenses of a received wisdom, they will begin to assume great responsibility for those decisions' consequences and the ensuing society will become truly theirs. In this way, people will grasp that democracy is not about servitude to philosophical tyrants, interpretive Popes or legal emperors,⁵³ but is about personal participation and social solidarity. In a world of incorrigible indeterminacy, the sane response is not despair or defeat. It is the bold acceptance that decision making is no more mysterious and no less complex than the rest of life. People must think, decide and act in the same way in law as they aspire to do in the rest of their lives — through concrete and constitutive conversations in which the participants speak and listen in a shared commitment to mutual enlightenment and continuing respect for the conversation's own ethical dynamic.⁵⁴ This recognition and aspiration will mean that democratic practice will have to be given priority over legalistic values. The devaluation of the Rule of Law, in a society in which it has come to signify rule by lawyers, is not an occasion to be lamented.

Within such democratic communities, intelligible action is not an extended genuflection to the revealed truth of Reason or Economic Efficiency, but is a situated act of constructive cooperation among ourselves. In all matters, decision making will be more than "the deliverance of a Reason so immanent that its own name is the only explanatory word it can utter."⁵⁵ There will be a general sensitivity to the fact that rationality is less a guide or limiting condition for individual action and more an achievement and elaboration of social engagement. Within such an enlightened context, indeterminacy will not engender efforts to gloss over or theorize it away. It will be attended to in a spirit of collective humility. While there is no relief

or escape from taking responsibility for life's always difficult and often painful decisions, there is a sustaining satisfaction in people facing and resolving them for themselves. Although it will be no less heated and contested, public policy-making can become a treasured creation of people's own craft and not the glossy product of legal chicanery. The appropriation of political discourse by a legal elite offends and inhibits the aspiration to progressive or egalitarian governance. In short, social justice will be brought about in spite of, not because of, lawyers.

In *Miller*, although all three judges mentioned it in passing, there was an overlooked democratic solution to the problem. An informed and electorally-accountable body had already considered the issue. Lord Denning mentioned the matter of planning approval, but only to dismiss it as misguided:

I must say that I am surprised that the developers of that housing estate were allowed to build the houses so close to the cricket ground. No doubt they wanted to make the most of their site and put up as many houses as they could for their own profit. The planning authorities ought not to have allowed it. The houses ought to have been so sited as not to interfere with the cricket. But the houses have been built and we have to contend with the consequences . . . [The cricket club] have spent money, labour and love in the making of [the cricket ground]; and they have the right to play on it as they have done for seventy years. Is this all to be rendered useless to them by the thoughtless and selfish act of an estate developer in building right up to the edge of it? (976 and 978)

Without speaking to the procedural niceties or substantive merits, it can be assumed that the development was neither entirely "thoughtless" nor "selfish." Before the developers could proceed, they had to obtain planning permission. This would have had to be granted in accordance with established regulations, formulated policies and required procedures. By ignoring this fact, the court substituted its own decision for that of the planning authorities'. Moreover, it did so without troubling to apprise itself of the details or reasoning of the planning authorities. However, the point is not who made the "correct" or "right" decision; it is which is the most appropriate body, in terms of institutional competence and democratic legitimacy, to do the necessary balancing and compromising of competing interest. On both counts, a less-than-ideal municipal board is preferable to an ideal-as-possible judicial bench.

In a democratic society, law will be another institutional site where the same contradictory impulses that constitute and challenge our individual selves can be openly addressed. And, as in our personal lives, any accommodation achieved in the response to indeterminacy will need to be self-conscious, tentative, and revisable. No signposts on life's journey will be found that are not of our own making. A realization might dawn that it is only possible to illuminate the way into the historical dark of the future by the clarity of our joint commitment and engagement. Rather than sight and pursue an imaginary light at the end of the historical tunnel—it will only be some philosopher's torch or economist's lantern anyway—we must look to each other. There is no shirking that responsibility. Domination and thralldom are all that can be hoped for when it is believed that theological relief is close at hand. The transcendental search will have to give way to the quest for greater participatory democracy.

QUESTIONS

1. Is Critical Legal Studies just a fancy version of Marxism, or does it offer a different analysis of law? In particular, how does each approach deal with postmodernism? Can you identify the key elements of the postmodern perspective? Does postmodernism itself undercut the critical analysis?
2. Is there anything about law, legal methodologies, or ways of legal thinking that remains sacred in the eyes of the crit? Is the crit just a trasher? If everything is politics, are we not irretrievably forced back into a Hobbesian state of nature, where life is "solitary, poor, nasty, brutish, and short"?
3. Does Hutchinson articulate a convincing alternative, democratic theory of law?
4. Which is the more persuasive analysis of tort law: Weinrib's self-proclaimed, apolitical, corrective justice approach, or Hutchinson's unabashedly political polemic? Which approach will better serve Canadian society? Is there such a thing as "Canadian society," or is that just a falsely constructed, pre-modern politico-judicial edifice?
5. Is anything beyond the realm of "politics"? Reconsider this question in the light of the feminist essays in this book.

ENDNOTES

1. See Carrington, "Of Law and The River" (1984), 34 *J. Legal Ed.* 227 and "Exchange" (1985), 35 *J. Legal Ed.* 1.
2. See M. Kelman, *A Guide to Critical Legal Studies* (1987).
3. Magee, "Sandcastles and the Search for Certainty" (1978), 99 *The Listener* 567, at 570 (an interview with Ernest Gellner).
4. On the relation between CLS and Law and Society, see D. Trubek, "Where the Action Is: Critical Legal Studies and Empiricism" (1984), 36 *Stan L. Rev.* 575.
5. See, for example, Livingston, "'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship" (1982), 95 *Harv. L. Rev.* 1669; Boliek, "The Two Worlds of the Trashers and the Lotus-Eaters: Flushing CLS from Out of the Bramble Bush" (1985), 37 *Ala. L. Rev.* 89; and Standen, "Critical Legal Studies as an Anti-Positivist Phenomenon" (1986), 72 *Virg. L. Rev.* 983.
6. See G. Gilmore, *The Ages of American Law* (1977), 87.
7. W. Twining, *Karl Llewellyn and the Realist Movement* (1973), 382.
8. See A. Gouldner, *The Two Marxisms* (1980).
9. See A. Hutchinson, *Critical Legal Studies* (1988) and Kennedy and Klare, "A Bibliography of Critical Legal Studies" (1984), 94 *Yale L. J.* 461.
10. See A. Hunt, "The Theory of Critical Legal Studies" (1986), 6 *Oxf. J. of Leg. Stud.* 1, at 33.

11. Peters, "Reality and the Language of the Law" (1981), 90 *Yale L. J.* 1192.
12. Learned Hand, "Mr. Justice Cardozo" (1938), 52 *Harv. L. Rev.* 361.
13. See, for example, Fried, "The Laws of Change: The Cunning of Reason in Moral and Legal History" (1980), 9 *J. Leg. Stud.* 335, at 336 (1980) and C. Fried, *Contract as Promise* (1980). While some strive to reveal the law's own inner luminescence, others seek to light up the law with an external battery of floodlights that draw their energy from a non-legal source. Both strategies are fraught with great risk. Not only do they chance the result that the light will be so searingly bright that its distortions will blind onlookers to much that is important in law, but also that the light will be mistaken for that which is to be illuminated. In short, the law's phosphorescence will amount to little more than the reflected radiance of the theorists' own normative lights. For an extended critique of this difficulty, see Hutchinson, "The Importance of Not Being Ernest" (1989), 34 *McGill L. J.* 145 and "That's Just The Way It Is: Langille on Law" (1988), 34 *McGill L. J.* 234.
14. See *Prohibitions Del Roy* (1608), Co. Rep. 65; 65 Eng. Rep. 1343.
15. By "politics," I do not simply mean conflicts over the exercise and control of government power; this is only a subspecies of a larger genus. I use the term to refer to the actual or latent conflicts over all the terms and conditions — social, economic, institutional, passionate and whatever — of our collective and individual lives. See R.M. Unger, *Social Theory: Its Situation and Its Task* (1987), 10. Also, by "law," I do not mean all phenomena that can be considered legal, for my focus is more restricted. While I encompass law as an analytical category and practical activity, my enquiry is about the work of courts and lawyers, whether they are dealing with the common law, statutes or constitutional norms. This essay makes no claims about the work of legislatures or constitutional conferences. Accordingly, my concern is with the relation between the larger world of politics and the smaller sphere of doctrinal development, especially in the development of the common law.
16. See Frug, "The Ideology of Bureaucracy in American Law" (1984), 97 *Harv. L. Rev.* 1276.
17. See Leff, "Contract as Thing" (1970), 19 *Am. U. L. Rev.* 131, at 157 (property is "a sort of vector analysis with time coordinates [of a bundle of forces]") and Hohfeld, "Some Fundamental Conceptions as Applied in Judicial Reasoning" (1913), 23 *Yale L. J.* 16 and (1917) 26 *Yale L. J.* 710.
18. For a fuller discussion of this process, see Cohen and Hutchinson, "Of Persons and Property: The Politics of Legal Taxonomy" (1990), 13 *Dal. L.J.* 20.
19. See Binder, "Beyond Criticism" (1988), 55 *U. Chi. L. Rev.* 888.
20. Gordon, "Law and Ideology" (1988), 3(1) *Tikkun* 14, at 15 (1988).
21. See Cohen and Hutchinson, *supra* endnote 18.
22. This is not to downplay the importance of these forces or the need to explore their precise operation. However, the focus of this paper is on the doctrinal consequences of their impact. For a general study of these wider issues, see J.A.G. Griffith, ed., *The Politics of the Judiciary* (1987).

23. Rubin, "Does Law Matter? A Judge's Response to the Critical Legal Studies Movement" (1987), 37 *J. Legal Ed.* 307. These sources include Ackerman, "Law, Economics and the Problem of Legal Culture" (1986), *Duke L.J.* 929, at 936-39; S. Burton, *Introduction to Law and Legal Reasoning* (1985), 188-93; Brosnan, "Serious But Not Critical" (1985), 60 *S. Cal. L. Rev.* 1205; Hegland, "Goodbye to Deconstruction" (1985), 58 *S. Cal. L. Rev.* 1203; Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma" (1987), 54 *U. Chi. L. Rev.* 462; Stick, "Can Nihilism Be Pragmatic?" (1986), 100 *Harv. L. Rev.* 332; Nelson, "An Exchange on Critical Legal Studies between Robert W. Gordon and William Nelson" (1988), 6 *Law & Hist. Rev.* 139, at 157-68; Fiss, "Law Proclaimed" in F. McArdle, ed., *The Cambridge Lectures 1985* (1987) 103; and Williams, "Critical Legal Studies: The Death of Transcendence and the New Langdells" (1987), 62 *N.Y.U.L. Rev.* 429.
24. Rubin, *supra* endnote 23, at 309.
25. See Cornell, "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation" (1988), 136 *U. Pa. L. Rev.* 1135, at 1207. See also S. Fish, "Is There a Text in This Class?" (1980) and Yablon, "The Indeterminacy of Law: Critical Legal Studies and the Problem of Explanation" (1985), 6 *Cardozo L. Rev.* 917.
26. See Derrida, "Signature Event Context" (1977), 1 *Glyph* 172.
27. Rubin, *supra* endnote 23, at 309.
28. See H.L.A. Hart, *The Concept of Law* (1963), 121-132 and R. Dworkin, *Taking Rights Seriously* (1979), 81-130.
29. This argument is analogous to the critique of the substance/process distinction in constitutional theory. See, for example, L. Tribe, *Constitutional Choices* (1985), 9-20.
30. For a fuller account of this argument, see Hutchinson and Wakefield, "A Hard Look at Hard Cases: The Nightmare of a Noble Dreamer" (1982), 2 *Oxf. J. of Leg. Stud.* 86.
31. Rubin, *supra* endnote 23, at 312.
32. See Kennedy, "Toward a Phenomenology of Adjudication" in A. Hutchinson and P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (1987).
33. [1977] Q.B. 966 (C.A.).
34. See *Sturges v. Bridgman* (1879), 11 Ch.D. 852 and *Ensign v. Walls*, 323 Mich. 49; 34 N.W. (2d) 549 (1948). Some of the best of the academic literature includes Baxter and Altree, "Legal Aspects of Airport Noise" (1972) 15 *J. L. & Econ.* 1; Calabresi and Hirschhoff, "Toward a Test for Strict Liability in Tort" (1972), 81 *Yale L.J.* 1055; Elickson, "Alternatives to Zoning" (1973), 40 *U. Chi. L. Rev.* 681; Epstein, "Defenses and Subsequent Pleas in a System of Strict Liability" (1974), *J. Legal Stud.* 165; and Michelman, "Property, Utility and Fairness" (1967), 80 *Harv. L. Rev.* 1165.
35. It does not take a cynical, or even close, reading between the lines to speculate that Denning's judgment might well be an example of such a cricket-loving rationalization.
36. *Brand v. Hammersmith Tly.* (1867), L.R. 2 Q.B. 233, at 247, per Erle C.J.

37. W. Landes and R. Posner, *The Economic Structure of Tort Law* (1987), 50.
38. *Ibid.*, at 51.
39. *Spur Industries, Inc. v. Del E. Webb Development Co.*, 108 Ariz. 178; 494 P.2d 700 (1972). For an acknowledgment that this decision is inconsistent with the common law rule, see Prichard, "An Economic Analysis of *Miller v. Jackson*" in *The Cambridge Lectures* 1985, *supra* endnote 23, at 71.
40. *Supra* endnote 37, at 51.
41. See Baker, "The Ideology of the Economic Analysis of Law" (1975), 5 *Phil. & Pub. Affs.* 3; Kennedy, "Cost-Benefit Analysis of Entitlement Problems: A Critique" (1981), 33 *Stan. L. Rev.* 387; and M. Kelman, *supra* endnote 2, at 114-50.
42. See *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194, at 1201 (1982).
43. See A. Sen, *On Ethics and Economics* (1988), 29-57.
44. For an extended introduction to deconstruction as a mode of legal critique, see A. Hutchinson, *Dwelling on the Threshold* (1988), 34-41. For a more technical and less radical account, see Balkin, "Deconstructive Practice and Legal Theory" (1987), 96 *Yale L. J.*
45. J. Derrida, *Positions*, trans., A. Bass, (1981), 43.
46. In writing the remainder of this section, I benefitted enormously from a lecture and unpublished paper by Frank Michelman. See "Miller v. Jackson En Critique" (November 1985).
47. Geoffrey Lane makes passing reference to the need to balance public and private interests and seems to favour private over public (1986). For an extended critique of the public/private distinction, see Hutchinson and Petter, "Private Rights and Public Wrongs: The Liberal Lie of the Charter" (1988), 38 *U. Tor. L. J.* 278 and Hutchinson, "Mice Under a Chair: Democracy, Courts and the Administrative State" (1990), 40 *U.T.L.J.* 374.
48. Quoting *Bolton v. Stone*, [1951] A.C. 850, at 867, per Lord Reid.
49. Michelman, *supra* endnote 46, at 5.
50. F. Nietzsche, *The Gay Science*, 2d ed. (1887), 108.
51. Learned Hand, *supra* endnote 12, at 361. Even the most pragmatic of constitutional commentators affirm "repeated acts of faith" that law "has both boundaries and moral significance not wholly reducible to, although never independent of, the ends for which it is deployed." See Tribe, *supra* endnote 29, at 4.
52. A. MacLeish, "The Hamlet of A. MacLeish" in *Collected Poems 1917-82* (1985).
53. See Fiss, "Objectivity and Interpretation" 34 *Stan. L. Rev.* 739, at 755 and R. Dworkin, *Law's Empire* (1986), 407.
54. See Hutchinson, "Talking the Good Life: From Liberal Chatter to Democratic Conversation" in *Law and Community: The End of Individualism* (1989), A. Hutchinson and L. Green, eds.
55. Michelman, *supra* endnote 46, at 14. See also J. Dewey, *The Quest for Certainty* (1929), 213.